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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

ROBERT RICHARD FRESCAS,

Defendant and Appellant.

E049568

(Super.Ct.No. INF058038)

OPINION

APPEAL from the Superior Court of Riverside County. Dale R. Wells, Judge.

Affirmed.

J. Kahn, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, Barry Carlton and Donald W. Ostertag, Deputy Attorneys General, for Plaintiff and Respondent.

A jury found defendant and appellant Robert Richard Frescas guilty of aggravated sexual assault of a child under 14 years of age and 10 or more years younger than

defendant (Pen. Code, §§ 269, subd. (a)(5), 289, subd. (a))¹ (count 1) and attempted forcible sexual penetration (§§ 664, 289, subd. (a)(1)), a lesser included offense of aggravated sexual assault (§§ 269, subd. (a)(5), 289, subd. (a)) as alleged in count 2. Defendant was sentenced to a determinate upper term of four years on count 2 and an indeterminate term of 15 years to life on count 1 with credit for time served. On appeal, defendant contends (1) the imposition of the upper term on count 2 based on facts not found by a jury beyond a reasonable doubt violated his Sixth Amendment right to a jury trial; and (2) the trial court improperly relied on the victim's young age in imposing the upper term on count 2. We reject these contentions and affirm the judgment.

I

FACTUAL BACKGROUND²

Defendant is Jane Doe's great-uncle. When Jane was nine years old, while she was staying at her grandmother's home, defendant grabbed Jane by the wrist, put his hand underneath her nightgown, and inserted his finger into her vagina. Jane created a distraction and was able to escape defendant's grasp. After defendant followed Jane, he again put his hand underneath her nightgown and tried to insert his finger into Jane's vagina. However, he ceased when another family member entered the room.

¹ All future statutory references are to the Penal Code unless otherwise stated.

² Because the specifics of the underlying facts are not relevant to the sentencing issues raised in this appeal, we will briefly recount the factual background as found in the probation officer's report.

II

DISCUSSION

A. *Imposition of Upper Term in Violation of Constitutional Rights*

Defendant contends that the imposition of upper terms based on facts not found by a jury beyond a reasonable doubt violated his Sixth Amendment right to trial.

At the October 30, 2009, sentencing hearing, the trial court imposed the upper term of four years for the attempted forcible sexual penetration conviction based on the following aggravating factors: (1) the crime involved great violence, great bodily harm, threat of great bodily harm, and other acts disclosing a high degree of cruelty, viciousness, or callousness (Cal. Rules of Court, rule 4.421(a)(1)); (2) the victim was particularly vulnerable (Cal. Rules of Court, rule 4.421(a)(3)) “compared to victims of similar crimes,” and due to her age, and “the fact that the crime took place in an environment that should have been safe”; and (3) defendant took advantage of a position of trust or confidence (Cal. Rules of Court, rule 4.421(a)(11)).

“Other than a prior conviction, [citation] . . . ‘any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.’ [Citations.]” (*Cunningham v. California* (2007) 549 U.S. 270, 282 [127 S.Ct. 856, 166 L.Ed.2d 856].) “[T]he relevant ‘statutory maximum[]’ . . . is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose without any additional findings.’ [Citation.]” (*Id.* at p. 275.)

Under section 1170, subdivision (b) as it stood through 2007, whenever a statute provided for a lower, a middle, and an upper term, the trial court was required to impose the middle term unless it found aggravating or mitigating circumstances. (Former § 1170, subd. (b), Stats. 2004, ch. 747, § 1.) For this reason, “the middle term . . . , not the upper term, [wa]s the relevant statutory maximum. [Citation.]” (*Cunningham v. California, supra*, 549 U.S. at p. 288; see also *People v. Sandoval* (2007) 41 Cal.4th 825, 852-853.)

Section 1170, subdivision (b), however, was amended effective January 1, 2008. (Stats. 2007, ch. 740, § 1.) As a result, by the time defendant was sentenced, it provided (as it still provides) that “the choice of the appropriate term shall rest within the sound discretion of the court.” This amendment “cure[d] the constitutional defect in the statute” and permitted the trial court to impose an upper term sentence based on facts not found by a jury beyond a reasonable doubt. (*People v. Sandoval, supra*, 41 Cal.4th at p. 844.) Moreover, the amendment can be applied to crimes committed before it went into effect; this does not violate ex post facto or due process principles. (*Id.* at pp. 853-857.)

We therefore conclude that the trial court did not err by imposing an upper term on the attempted forcible sexual penetration conviction based on facts not found by the jury beyond a reasonable doubt.

B. *Imposition of Upper Term Based on Improper Factors*

Defendant next contends that the trial court improperly relied on “victim vulnerability and callousness of the offense because these conclusions were premised on

the fact that the victim was only nine years old and the victim's age was an element of the offense."

Defendant failed to object to the reasons for the court's sentencing choice at trial. The court's use of improper factors to impose the upper term is a discretionary choice that is waived if not brought to the sentencing court's attention. (*People v. Scott* (1994) 9 Cal.4th 331, 352-353; *People v. Brown* (2000) 83 Cal.App.4th 1037, 1041-1042.) Having failed to object below to the court's reasons for imposing the upper term, defendant cannot do so for the first time on appeal.

Defendant's waiver notwithstanding, no error occurred. The imposition of sentence rests within the sound discretion of the trial court, and absent a clear showing of abuse or departure from the law such discretion will be upheld. (*People v. Giminez* (1975) 14 Cal.3d 68, 72.)

We agree that "[a] circumstance which is an element of the substantive offense cannot be used as a factor in aggravation. [Citation.]" (*People v. Clark* (1992) 12 Cal.App.4th 663, 666.) Thus, "aggravating a sentence due to 'particular vulnerability,' where vulnerability is based *solely* on age, is improper when age is an element of the offense. [Citations.]" (*People v. Dancer* (1996) 45 Cal.App.4th 1677, 1693-1694, overruled on another ground in *People v. Hammon* (1997) 15 Cal.4th 1117, 1123.)

However, defendant here was convicted of the lesser included offense of attempted sexual penetration in violation of section 289, subdivision (a)(1). That section provides, "Any person who commits an act of sexual penetration when the act is accomplished against the victim's will by means of force, violence, duress, menace, or

fear of immediate and unlawful bodily injury on the victim or another person shall be punished by imprisonment in the state prison” Contrary to defendant’s assertion, age is not an element of section 289, subdivision (a)(1). Although defendant was *charged* with violating section 269, subdivision (a)(5), which does have a young age element, he was *convicted* of section 289, subdivision (a)(1).

Even if we assume, for the sake of argument, that age is an element of section 289, subdivision (a)(1), “a victim’s extremely young age together with other circumstances like the time and location of the offense can establish ‘particular vulnerability’ as an aggravating factor.” (*People v. Dancer, supra*, 45 Cal.App.4th at p. 1694.) “[P]articular vulnerability’ is determined in light of the ‘total milieu in which the commission of the crime occurred’ [Citation.]” Given the fact that the offenses were committed at the home of the victim’s great-uncle, the court could reasonably find the victim particularly vulnerable without merely considering her young age. (*Ibid.*)

Even assuming the particular vulnerability factor was improperly relied upon, a single aggravating factor will justify the upper term. (*People v. Osband* (1996) 13 Cal.4th 622, 732.) In addition, the court has broad discretion to balance aggravating and mitigating factors qualitatively as well as quantitatively. (*People v. Lamb* (1988) 206 Cal.App.3d 397, 401.) Moreover, the court may disregard any mitigating factor. (*People v. Avalos* (1996) 47 Cal.App.4th 1569, 1583.)

Here, the court considered the totality of the circumstances in imposing the upper term, and since the court properly found that the offense involved callousness (Cal. Rules of Court, rule 4.421(a)(1)) and defendant betrayed a position of trust in committing the

offense (Cal. Rules of Court, rule 4.421(a)(11)), it is not reasonably probable the court would have imposed a low term or middle term sentence.³

The totality of the record supports the trial court’s proper exercise of discretion in sentencing defendant.

III

DISPOSITION

The judgment is affirmed.

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RICHLI
J.

We concur:

RAMIREZ
P.J.

MILLER
J.

³ We disagree with defendant’s claim that when the court’s statements “are read together, it is clear that the trial court was equating vulnerability and callousness with age” To the extent defendant argues that the trial court erred in relying on callousness as a factor, again, we find defendant waived this issue. (*People v. Scott*, *supra*, 9 Cal.4th at pp. 352-353.) In any event, the court also found that defendant had betrayed a position of trust in committing the offense (Cal. Rules of Court, rule 4.421(a)(11)), a valid factor to which defendant takes no issue.